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## MILE HIGH ASSAULTS: AIR CARRIER LIABILITY UNDER THE WARSAW CONVENTION

JUDITH R. KARP\*

ON A WARM summer evening, a young woman boards an airplane for a long international flight across the Pacific Ocean from Korea to California.<sup>1</sup> She falls asleep and awakens three hours later in a dimly lit cabin, shocked to find that a male passenger is sexually molesting her. While she slept, the passenger seated next to her had unbuckled her seat belt, unbuttoned her clothing, and had begun to fondle her.<sup>2</sup> Her assailant subsequently pleads guilty to the crime of engaging in unwelcome sexual conduct.<sup>3</sup> Miles from there, in another part of the world, a male passenger waits in line to use a restroom during an international flight from Boston to Paris.<sup>4</sup> Suddenly, he feels a hand forcefully grab and squeeze his testicles, causing him excruciating pain.<sup>5</sup> The victim identifies his assailant as another male passenger and seeks help from the flight attendants. The victim claims that the attendants ignore his protests.<sup>6</sup> The airline fails to detain the alleged assailant when the flight arrives at its destination.<sup>7</sup> Both passengers sue the airlines<sup>8</sup> to recover

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<sup>1</sup> *Wallace v. Korean Air*, 214 F.3d 293, 295 (2d Cir. 2000), *cert. denied*, 121 S. Ct. 1079 (2001). For a more thorough discussion of this case, see *infra* Part III.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). For a more thorough discussion of this case, see *infra* Part III.

<sup>5</sup> *Id.* at 70.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> The female passenger filed a lawsuit against Korean Air in February 1998. *Wallace*, 214 F.3d at 295. The male passenger filed a lawsuit against American Airlines. *Langadinos*, 199 F.3d at 69.

for the alleged assaults under the provisions of the Warsaw Convention.<sup>9</sup>

Previously, the provisions of the Warsaw Convention would have severely limited these international travelers'<sup>10</sup> ability to seek legal redress against the air carriers for the tortious actions of other passengers.<sup>11</sup> In recent years, however, security and passenger safety have become a real concern for the travel industry. Unruly passengers have interfered with the safe passage of other passengers at an alarming rate. Although the number of reported in-flight disturbances in the United States has declined in recent years, the number of worldwide incidents has dramatically increased.<sup>12</sup> According to a survey conducted by the International Air Transport Association (IATA),<sup>13</sup> the number of aggressive incidents on international air flights worldwide increased from 1,132 cases in 1994 to 5,416 cases in 1997.<sup>14</sup> In recent mid-flight incidents, a passenger grabbed two other passengers by the throat and tried to open an exit door;<sup>15</sup> a passenger injured a child seated in front of her when she "mule kicked" the seat to stop the child from fidgeting;<sup>16</sup> and an intoxi-

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<sup>9</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, 3014-23, 137 L.N.T.S. 11 [*hereinafter* Warsaw Convention]. For a discussion of the Warsaw Convention, see *infra* Part II.

<sup>10</sup> The Warsaw Convention applies to international air transportation. The following four factors are used to determine whether the transportation involved was international for purposes of the Warsaw Convention: (1) the point of departure; (2) the destination; (3) any agreed stopping places; and (4) the High Contracting Parties to the treaty. See LAWRENCE B. GOLDBIRSH, *THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK* 14 (2000).

<sup>11</sup> See, e.g., *Price v. British Airways*, No. 91 Civ. 4947, 1992 WL 170679, at \*2 (S.D.N.Y. July 6, 1992) (holding air carrier not liable under the Warsaw Convention to passenger who was injured in a fistfight with another passenger); *Stone v. Cont'l Airlines, Inc.*, 905 F. Supp. 823 (D. Haw. 1995) (dismissing claims under Warsaw Convention for injury allegedly caused by fellow passenger's unprovoked punch). See also discussion *infra* pp. 1557-58.

<sup>12</sup> Bryon Okada, *Air Rage Declines in U.S. Despite Global Surge, Workers Say*, KNIGHT-RIDDER TRIB. BUS. NEWS, July 7, 2000, available at 2000 WL 23529038.

<sup>13</sup> IATA is a private worldwide organization of international air carriers.

<sup>14</sup> Valerie Ng, *Blame Airlines, Say Staff and Crew*, THE STRAITS TIMES (Singapore), July 30, 2000, at 10, available at 2000 WL 2979862.

<sup>15</sup> *Man Attempts to Leave Aircraft Mid Flight*, AIRLINE INDUS. INFO., Feb. 14, 2000, available at 2000 WL 4775063.

<sup>16</sup> *Woman Faces Six Months in Jail for Air Rage 'Mule Kick'*, AIRLINE INDUS. INFO., Sept. 28, 1999, available at 1999 WL 10470751.

cated passenger attacked two fellow passengers and broke a window at the rear of a jet airplane.<sup>17</sup>

The most tragic of these violent incidents involved a passenger who attacked his fellow passengers as he attempted to break into the cockpit area of the airplane.<sup>18</sup> The combative passenger was "strangled, beaten and kicked" by fellow passengers who restrained him.<sup>19</sup> An autopsy concluded that his death was a homicide. The United States Attorney's Office described the death "as an act of self-defense by passengers" and has declined to press charges.<sup>20</sup>

Many mid-flight incidents involve sexual misconduct. For instance, Singapore Air reported that, in 1997, one-third of the reported cases of "unruly behavior" among passengers on its airplanes involved sexual misconduct.<sup>21</sup> In recent incidents, a passenger sexually molested a fifteen-year-old boy as he slept;<sup>22</sup> a passenger was charged with masturbating in front of a teenage girl;<sup>23</sup> and an intoxicated passenger grabbed the breast of one female passenger and groped another several times.<sup>24</sup>

Governments and the travel industry are responding to the public's concern about security aboard airplane flights.<sup>25</sup> Members of the airline industry discussed the problems of sexual har-

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<sup>17</sup> Briton Pleads Guilty to 'Air Rage,' AIRLINE INDUS. INFO., Feb. 18, 1999, available at 1999 WL 10468467.

<sup>18</sup> The Associated Press, *Travelers Killed Teen Aboard Jet, Prosecutor Says*, SUN SENTINEL (Ft. Lauderdale, Fla.), Sept. 9, 2000, at 6A, available at 2000 WL 22197464 [hereinafter *Travelers Killed Teen*]; Timothy Roche, *Homicide in the Sky: The Death of an Unruly Southwest Airlines Passenger Remains a Mystery. Was it Mob Justice?*, TIME MAG., Oct. 12, 2000, at 44, available at 2000 WL 25227192.

<sup>19</sup> *Travelers Killed Teen*, supra note 18.

<sup>20</sup> *Id.*

<sup>21</sup> Some of the sexual misconduct involved consensual encounters, while other incidents involved various forms of assault. See Asra Q. Nomani, "It's Uninhibited Up There," *Airlines Increasingly Finding*, HOUS. CHRON., June 21, 1998, at 3, available at 1998 WL 3584564.

<sup>22</sup> Matt O'Connor, *Stylist Sentenced to Prison for Molesting Boy on Plane*, CHI. TRIB., Sept. 20, 2000, at 4, available at 2000 WL 3710747.

<sup>23</sup> David Kidwell, *Sex Offender Faces New Charges*, MIAMI HERALD ABSTRACTS, March 15, 2000, at 1B.

<sup>24</sup> *Man Jailed for Indecent Assault and Drunkenness in Flight*, AIRLINE INDUS. INFO., Aug. 26, 1999, available at 1999 WL 10470312. For additional newspaper articles detailing incidents of assaults aboard commercial aircrafts, see also *\$500 Fine for Assaulting Passenger*, THE PRESS (Christchurch), Mar. 1, 2000, at 10, available at 2000 WL 14528125; *Home News: Passenger Admits Sexual Assault*, IRISH TIMES, Feb. 17, 2000, at 4, available at 2000 WL 14083749; *Man Held After Biting Woman on JAL Flight*, MINICHI DAILY NEWS, Feb. 20, 1998, at 16.

<sup>25</sup> See discussion *infra* pp. 1562-63.

assment and sexual assault of flight attendants and passengers at a 1997 airline industry cabin-safety symposium.<sup>26</sup> Airline industry officials worldwide found the increase in the number of sexual offenses by passengers aboard airline flights to be a "particularly worrying trend."<sup>27</sup>

The courts are also responding to passengers' concerns. Recent court decisions have limited the liability protections previously provided to air carriers.<sup>28</sup> The airline industry can no longer rely on the Warsaw Convention as a safe haven from personal injury lawsuits brought by passengers on international air flights. For example, courts within the United States have expanded air carrier liability to include incidents of hijackings, terrorist attacks, and now sexual assaults committed by fellow passengers. This article focuses on how United States courts have handled international incidents of sexual assaults and the impact of the Warsaw Convention on claims arising from such incidents.<sup>29</sup>

## I. CLAIMS GOVERNED BY WARSAW CONVENTION.

A seventy-year-old international treaty, the Warsaw Convention, governs personal injury claims against international air carriers that are filed by passengers.<sup>30</sup> The Warsaw Convention is a private multilateral treaty that governs air travel and cargo liability. The treaty, first drafted at an international conference in Paris in 1925, was revised several times before it was reconsidered and signed at a second conference in Warsaw in 1929.<sup>31</sup> The treaty was intended to balance the needs of the air industry and its customers.<sup>32</sup> When the Warsaw Convention was first conceived in the mid to late 1920's, civil aviation was in its infancy. The larger airliners, carrying fifteen to twenty passengers, could

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<sup>26</sup> Nomani, *supra* note 21.

<sup>27</sup> *Id.*

<sup>28</sup> See discussion *infra* Part III.

<sup>29</sup> Courts in signatory countries of the Warsaw Convention have recognized the importance of examining and following the foreign jurisprudence of other countries that adhere to the Convention so that the treaty can be interpreted and applied in a uniform manner. See, e.g., *Air Fr. v. Saks*, 470 U.S. 392, 404 (1985); *Sidhu v. British Airways, Plc.*, [1997] 1 All E.R. 193 (U.K. H.L.), available at 1996 WL 1092197.

<sup>30</sup> Article 17 of the Convention establishes the liability of international air carriers for harm to passengers. Article 18 contains provisions regarding liability for damage to baggage. See discussion *infra* p. 1554-55.

<sup>31</sup> *Saks*, 470 U.S. at 401.

<sup>32</sup> *El Al Isr. Airlines, Ltd. v. Tseng*, 525 U.S. 155, 170 (1999).

cruise at speeds of about 100 miles per hour.<sup>33</sup> The treaty provided limited liability protection to air carriers in case of accidents in an effort to encourage the development of the fledgling air transportation industry.<sup>34</sup> Limited liability for accidents was intended to reduce the operating expenses of air carriers, which in turn, would then reduce transportation charges for passengers and shippers.<sup>35</sup>

Uniformity has always been the underlying principle of the Warsaw Convention.<sup>36</sup> The primary objective of the Convention is to "achieve uniformity of rules governing claims arising from international air transportation."<sup>37</sup> Uniformity with respect to liability allowed the airlines to raise the investment capital that was needed to expand their operations.<sup>38</sup> Since the Convention was first drafted in the mid 1920's, there has been a rapid development in civil aviation. At the end of the twentieth century, United States airlines carried 643.3 million passengers.<sup>39</sup> The Federal Aviation Administration (FAA) anticipates the number of air travelers to increase to one billion people by the year 2010.<sup>40</sup> The number of worldwide passengers is expected to rise to three billion passengers by 2001.<sup>41</sup> While the development of the airline industry has led to profitability for individual airlines, there has been a corresponding extension of air carrier liability under the Warsaw Convention for injuries suffered by passengers.<sup>42</sup>

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<sup>33</sup> Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 498 (1967).

<sup>34</sup> *Id.* at 499-500.

<sup>35</sup> *Id.* at 499.

<sup>36</sup> *Tseng*, 525 U.S. at 169, 171.

<sup>37</sup> *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 550, 552 (1991).

<sup>38</sup> Lowenfeld & Mendelsohn, *supra* note 33.

<sup>39</sup> U.S. FAA *Annual Aviation Forecast Predicts Increase in Air Travel Demand*, AIRLINE INDUS. INFO., Mar. 26, 1999, available at 1999 WL 10468842.

<sup>40</sup> *Id.*

<sup>41</sup> *Number of Air Travelers Worldwide to Reach 3 Billion by 2001*, AFX NEWS, July 21, 1999.

<sup>42</sup> See e.g., *Convention for the Unification of Certain Rules for International Carriage by Air*, ICAO Doc. 9740 (May 28, 1999), reprinted in *Multilateral Convention for International Carriage by Air*, S. Treaty Doc. No. 106-45, 1999 WL 33292734 [*hereinafter* Montreal Convention]. This new international treaty is intended to modernize and consolidate the Warsaw Convention and related instruments. The Montreal Convention creates a two-tier liability system. It eliminates the cap on carrier liability to accident victims for damages caused by the negligence or wrongful act or omissions of the carrier, holds carriers strictly liable for proven damages up to 100,000 Special Drawing Rights (approximately \$135,000), and also provides for United States jurisdiction for most claims brought on behalf of

Most of the countries in the world are party to the Warsaw Convention. As of June 1999, 147 countries were signatories to the Convention.<sup>43</sup> The United States has been a signatory since 1934.<sup>44</sup> The United States Supreme Court has recognized that airline passengers seeking redress for personal injuries suffered during an international flight are limited to filing claims under the Warsaw Convention.<sup>45</sup>

## II. WHAT IS A WARSAW CONVENTION "ACCIDENT?"

Article 17 of the Warsaw Convention is designed as a compromise between passengers seeking to recover for personal injuries and air carriers seeking to limit potential liability.<sup>46</sup> Article 17 provides for air carrier liability "for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."<sup>47</sup> A passenger seeking relief for personal injury claims under the Warsaw Convention must establish that "bodily injury"<sup>48</sup> or death occurred on board the aircraft or during em-

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United States' passengers. J.C. Batra, *Modernization of the Warsaw System-Montreal 1999*, 65 J. AIR L. & COM. 429 (2000). The Montreal Convention was submitted to the United States Senate for ratification on September 6, 2000. President's Message to the Senate Transmitting the Convention for the Unification of Certain Rules for International Carriage by Air with Documentation, 36 Weekly Comp. of Pres. Doc. 2013 (Sept. 11, 2000).

<sup>43</sup> See *Status of Certain International Air Law Instruments*, ICAO J., July-August, at 33.

<sup>44</sup> Warsaw Convention, *supra* note 9.

<sup>45</sup> In *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 161 (1999), the United States Supreme Court stated that "recovery for a personal injury suffered on board an aircraft or in the course of any of the operations of embarking or disembarking . . . if not allowed under the Convention, is not available at all." English and Canadian courts have reached the same conclusion. See, e.g., *Sidhu v. British Airways, Plc.*, [1997] 1 All E.R. 193; *Naval-Torres v. Northwest Airlines* [1998] 159 D.L.R. (4th) 67.

<sup>46</sup> Article 17 denies carriers the "contractual prerogative" to limit liability for personal injury. Articles 22 and 24 restrict passenger claims and limit the amount of damages. *Tseng*, 525 U.S. at 170-71.

<sup>47</sup> The text of the Warsaw Convention is written in the French language. The language of Article 17 is from the official translation of this portion of the convention, which was before the Senate when it ratified the Convention in 1934. See *Air Fr. v. Saks*, 470 U.S. 392, 397 (1985) (citing 49 Stat. 3018).

<sup>48</sup> The United States Supreme Court has stated that "bodily injury" requires proof of some physical injury and excludes recovery for purely emotional injuries. *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

barking or disembarking, and that the injury was caused by an "accident."<sup>49</sup>

The Convention itself does not define the term "accident." Courts applying the provisions of Article 17 of the Convention have followed the lead of the United States Supreme Court. The Court, in *Air France v. Saks*,<sup>50</sup> determined that for an "accident" to be compensable under Article 17 the passenger's injuries must be caused by "an unexpected or unusual event or happening that is external to the passenger."<sup>51</sup> There is no "accident" if the injuries result from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft.<sup>52</sup> The *Saks* court recognized that this definition is to be "flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."<sup>53</sup> The passenger only needs to prove that some link in the causal chain was an unusual or unexpected event external to the passenger.<sup>54</sup>

The *Saks* Court relied upon the French legal meaning of "accident" because the original treaty was drafted in French.<sup>55</sup> In the French language, when the term "accident" is used to describe a cause of an injury, it is usually defined as an unexpected, unusual, or unintended event.<sup>56</sup> The *Saks* court adopted this meaning to define an Article 17 "accident." Under the *Saks* definition, the cause of the injury must satisfy this definition and not the occurrence of the injury alone.<sup>57</sup> An Article 17 "accident" is not the passenger's injury; rather it is an "accident" which caused the passenger's injury.<sup>58</sup> The passenger in *Saks* sued the airline because she suffered permanent deafness allegedly caused by changes in air pressure during a flight. The

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<sup>49</sup> *Tseng*, 525 U.S. at 168. None of the earlier drafts of the treaty required that an accident cause the passenger's injury. At a 1929 international conference convened to review the drafts of the Convention, the drafting committee proposed a redrafted Article 17 that required as a prerequisite to liability that an accident cause the passenger's injury. *Saks*, 470 U.S. at 402.

<sup>50</sup> 470 U.S. 392 (1985).

<sup>51</sup> *Id.* at 405.

<sup>52</sup> *Id.* at 406.

<sup>53</sup> *Id.* at 405.

<sup>54</sup> *Id.* at 404.

<sup>55</sup> *Saks*, 470 U.S. at 399. The treaty has been translated into several languages. The United States, Great Britain, Spain, Argentina, Mexico and Canada have their own translations. See GOLDHIRSCH, *supra* note 10, at 4.

<sup>56</sup> This definition is similar to definitions of the term in Great Britain, German, or the United States. *Saks*, 470 U.S. at 399-400.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 398.



Court found that loss of hearing proximately caused by depressurization of the aircraft was not an "accident" within the meaning of Article 17 because it was the passenger's own internal reaction to the usual depressurization of the airplane.<sup>59</sup>

A passenger's own physical condition does not satisfy the definition of "accident" even when an airline's conduct may have aggravated a condition. For example, courts have declined to find an "accident" in cases where it is alleged that the airline failed to provide medical treatment to a heart attack victim,<sup>60</sup> or where the airline failed to make an unscheduled landing at an airport so that a heart attack victim could receive immediate treatment.<sup>61</sup>

Courts from other signatory countries have applied a similar definition to an Article 17 "accident." For example, a British court in *Chaudhari v. British Airways, Plc.*, ruled that a disabled passenger's claim was not an Article 17 "accident" because his injuries resulted from his own pre-existing medical condition.<sup>62</sup> The disabled passenger sustained injuries to his hipbone in a fall from his seat. The court construed the focus of an Article 17 "accident" to be the cause and not the effect.<sup>63</sup> The court concluded that the injuries were not caused by any "unexpected or unusual event or happening external to the passenger;" rather they were caused by his own personal, particular, or peculiar reaction to the normal operation of the aircraft.<sup>64</sup>

A Canadian court used similar reasoning in *Quinn v. Canadian Airlines International, Ltd.*, when it dismissed a claim for injuries allegedly caused by turbulence on an international flight from Toronto, Canada to St. Petersburg, Florida.<sup>65</sup> The court held that the turbulence was not unusual or unexpected so as to constitute an "accident" within the meaning of Article 17.<sup>66</sup> How-

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<sup>59</sup> *Id.*

<sup>60</sup> *Fischer v. Northwest Airlines*, 623 F. Supp. 1064, 1065 (N.D. Ill. 1985).

<sup>61</sup> *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (11th Cir. 1997). In a recent decision, however, a federal district court refused to dismiss a lawsuit against an airline brought by the family of a man who suffered a fatal heart attack on an international flight after the airline allegedly refused to administer medical assistance or to make an emergency landing. Bob Egelko, *Kin of Man Who Died on Airliner OK'd to Sue*, SAN FRAN. EXAM. Sept. 26, 2000, at A5, available at 2000 WL 6168582.

<sup>62</sup> [1997] Times 7 May 1997 (Apr. 16, 1997).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> [1994] 18 O.R.3d 326.

<sup>66</sup> *Id.*

ever, another Canadian court, in *Naval-Torres v. Northwest Airlines, Inc.*, interpreted the term "accident" in Article 17 to include intentional acts of wrongdoing.<sup>67</sup> The court rejected the suggestion that an Article 17 "accident" includes only inadvertent or negligent acts by a carrier. According to the *Naval-Torres* court, such a conclusion would lead to the extraordinary result that the Convention provides a remedy for inadvertence or negligence without any remedy for deliberate wrongdoing.<sup>68</sup> In *Naval-Torres*, the court held that injury resulting from exposure to second-hand smoke while on board an international flight from Canada to the Philippines constitutes an "accident."<sup>69</sup> Hence, courts have begun to hold an air carrier liable for the airline's intentional acts of wrongdoing as well as for the intentional acts of wrongdoing committed by its passengers.

### III. ARTICLE 17 "ACCIDENT" ENCOMPASSES TORTIOUS ACTIONS OF CO-PASSENGERS.

Since *Air France v. Saks*, courts have struggled with the *Saks* definition of "accident," with some concluding that the definition is broad enough to permit recovery for certain torts committed by fellow passengers.<sup>70</sup> With the rise in terrorist hijackings in the 1970's and 1980's, courts did not hesitate to find an Article 17 "accident" when the circumstances involved bomb threats, terrorist attacks, or hijackings.<sup>71</sup>

In *La Compagnie Nationale Air France, SA v. Haddad*, a French court determined that the term "accident" could not be restricted to technical or mechanical accidents affecting the aircraft.<sup>72</sup> The court ruled that physical injuries resulting from hijackers aboard an international flight from Tel Aviv, Israel to Paris, France, was within the category of Article 17 compensable acts. The court found that the term applies to troubles during a normal flight that result from "unforeseen intervention by malevolent third parties," such as in the circumstances of a hi-

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<sup>67</sup> [1998] 159 D.L.R. (4th) 67, 76.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Langadinos v. Am. Airlines, Inc.*, 199 F.3d 68, 70 (1st Cir. 2000); *Wallace v. Korean Air*, 214 F.3d 293, 299 (2d Cir. 2000).

<sup>71</sup> *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) (en banc) (involving a terrorist attack); *Pflug v. Egyptair Corp.*, 961 F.2d 26 (2d Cir. 1992) (involving a hijacking); *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975) (involving a terrorist attack); *Salerno v. Pan Am. World Airways*, 606 F. Supp. 656 (S.D.N.Y. 1985) (involving a bomb threat).

<sup>72</sup> CA Paris, June 19, 1979, E.C.C. 1981, 207, available at 1981 WL 186649.

jacking.<sup>73</sup> The air carrier in *Haddad*, however, avoided liability under the "due care" defense provided in Article 20 of the Warsaw Convention. Article 20 provides an air carrier with a defense to liability when it is impossible for the carrier or its agents to take necessary measures to avoid the damage.<sup>74</sup> Since the hijackers boarded the airplane during a stop in Athens where the airline had no authority or police power to inspect embarking passengers, the court found that it was impossible for the airline to take all the measures necessary to avoid the damage.<sup>75</sup>

Courts, however, have been reluctant to expand the definition of the term "accident" to include all intentional torts committed by passengers. Some courts have required the event to arise from "risks that are characteristic of air travel" or be related to the "operation of the aircraft" in order for it to constitute an "accident."<sup>76</sup> If an event is not within the airline's control, then the event cannot fall within the "operation of the aircraft."<sup>77</sup> For example, in *Stone v. Continental Airlines*, an air carrier successfully argued that when an intoxicated passenger punched a fellow passenger in the face, the assault could not constitute an "accident" because it was not a risk "characteristic of air travel."<sup>78</sup> Courts using this approach distinguish between hijackings and terrorist attacks, events that are characteristic of air travel and thus, "accidents," from fights between passengers. In *Price v. British Airways*, the court stated that it would be absurd to find that a fistfight between passengers was either a characteristic risk of air travel or a risk that air carriers could easily guard against through protective security measures.<sup>79</sup> Other courts use a broader definition, recognizing that the Supreme Court definition in *Saks* did not state that an "accident" must relate to

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<sup>73</sup> *Id.*

<sup>74</sup> Article 20 provides in relevant part: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Airlines that adhere to the Montreal Agreement have agreed to waive Article 20 as a defense. *Air France v. Saks*, 470 U.S. 392 (1985). The Montreal Agreement applies to flights with departures, destinations, or a stopping place within the United States. See GOLDHIRSCH, *supra* note 10, at 85.

<sup>75</sup> *Haddad*, E.C.C. 1981, 207, available at 1981 WL 186649.

<sup>76</sup> *Wallace*, 214 F.3d at 298.

<sup>77</sup> *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881 (5th Cir. 1996).

<sup>78</sup> 905 F. Supp. 823, 827 (D. Haw. 1995).

<sup>79</sup> No. 91 Civ. 4947, 1992 WL 170679, at \*3 (S.D.N.Y. July 6, 1992).

air travel.<sup>80</sup> These courts have held that the definition of an Article 17 "accident" was not limited to injuries resulting from dangers occurring only in aviation.<sup>81</sup>

Recently, courts have expanded carrier liability in response to the rise in sexual assaults aboard commercial air carriers. *Wallace v. Korean Air*, a federal appellate court case, is the latest in a series of cases where the American courts have recognized expanded air carrier liability for tort actions committed by passengers.<sup>82</sup> In *Wallace*, the court held that a female passenger could sue an air carrier for injuries suffered on board an international flight when a fellow passenger sexually assaulted her.

The female passenger in *Wallace* was sexually assaulted on an international flight en route from Korea to California. She was seated in a window seat; two male passengers sat between her seat and the aisle of the airliner's cabin.<sup>83</sup> The young woman had not spoken to either of the male passengers. She fell asleep shortly after finishing her in-flight meal. While she slept in the darkened plane, the male passenger seated next to her placed his hand in her clothing and sexually molested her.<sup>84</sup> His actions awakened her and she turned away, but he continued the unwelcome advances. The young woman then hit him hard and climbed over the other male passenger to make her escape to the aisle of the cabin.<sup>85</sup> She found a flight attendant at the back of the aircraft and complained about the incident. The flight attendant reassigned her to another seat.<sup>86</sup> The male passenger was later arrested when the flight arrived in Los Angeles, California. He subsequently pled guilty to the federal crime of engaging in unwelcome sexual conduct with another person.<sup>87</sup>

The *Wallace* court ruled that the male passenger's sexual molestation of the female passenger constituted an "accident" under Article 17 of the Convention. The court did not find it necessary to address the broad issue of whether all co-passenger

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<sup>80</sup> These courts stress that *Saks* only discussed the narrow issue of whether the "normal operation of an aircraft" could give rise to an Article 17 "accident." *Wallace*, 214 F.3d at 298.

<sup>81</sup> *Barratt v. Trin. & Tobago (BWIA Int'l) Airways Corp.*, No. CV 88-3945, 1990 WL 127590, at \*2 (E.D.N.Y. Aug. 28, 1990); *Gezzi v. British Airways Plc.*, 991 F.2d 603, 605 n.4 (9th Cir. 1993).

<sup>82</sup> *Wallace*, 214 F.3d at 293.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Wallace*, 214 F.3d at 295.

torts fall within an Article 17 "accident." Instead, the court applied the narrow "characteristic risk of air travel test."<sup>88</sup> The court concluded that, given the circumstances surrounding the assault, the characteristics of air travel increased the female passenger's vulnerability to the assault; the court cited the physical setting of the attack as a significant factor in reaching its decision.<sup>89</sup> The young woman was seated in a confined space beside two men she did not know; when the lights were dimmed, one of the male passengers, when left unsupervised in the dark, turned out to be a sexual predator.<sup>90</sup> The manner of the attack was also a significant factor in the decision. During the entire incident not a single flight attendant noticed a problem.<sup>91</sup> The court found that the male passenger's actions could not have been entirely inconspicuous.<sup>92</sup> Finally, the court found it significant that the female passenger could not immediately escape, but had to endure further advances before climbing out to the aisle.<sup>93</sup>

In an earlier 1997 case, a female plaintiff was likewise successful in her bid to proceed with a lawsuit based on circumstances much like those in *Wallace*. In *Tsevas v. Delta Air Lines, Inc.*, a female passenger who had traveled alone on a transatlantic flight from Frankfurt, Germany to Atlanta, Georgia, sued the airlines after she was physically and verbally assaulted by an intoxicated male passenger who was seated next to her.<sup>94</sup> During the flight, attendants served the male passenger wine and other alcoholic beverages.<sup>95</sup> The female passenger informed the flight attendants that the man was intoxicated. Nevertheless, the flight attendants continued to serve the male passenger alcoholic beverages and refused to move the woman to another

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<sup>88</sup> *Id.* at 299. The concurring opinion concluded that a co-passenger tort satisfies the *Saks* definition of an "accident" without the additional "inherent in air travel" requirement. *Id.* at 301 (Pooler, J., concurring).

<sup>89</sup> *Id.* at 299.

<sup>90</sup> *Id.* at 300.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> The court vacated the dismissal of the lawsuit and remanded the matter to the United States District Court for the Southern District of New York. *Wallace*, 214 F.3d at 300.

<sup>94</sup> No. 97C0320, 1997 WL 767278, at \*1 (N.D. Ill. Dec. 1, 1997).

<sup>95</sup> *Id.*

seat.<sup>96</sup> The flight attendants finally relocated her to another seat after she complained that he grabbed, fondled, and kissed her.<sup>97</sup>

The *Tsevas* court held that the woman's alleged injuries resulted from an "accident" because the alleged sexual attacks, coupled with the service of alcoholic beverages and refusal to intervene constituted "unexpected or unusual events" external to the female passenger, beyond the usual and normal operation of the aircraft.<sup>98</sup> The court applied the "characteristic risk of air travel" test, concluding that service on board flights is related to the operation of the aircraft.<sup>99</sup>

Incidents of sexual assault on airplane flights have not been limited to female passengers. According to the allegations of a recent lawsuit, a male passenger, who was also subjected to physical sexual assaults, claims that the airline was responsible for his injuries. In *Langadinos v. American Airlines*, a male passenger allegedly suffered injuries aboard an international flight from Boston to Paris when airline personnel continued to serve alcohol to an intoxicated male passenger who subsequently assaulted the complainant.<sup>100</sup> According to the complaint's allegations, airline employees served the passenger alcohol even though they knew he was intoxicated and that his behavior was "erratic" and "aggressive."<sup>101</sup> The complainant alleged that the male passenger forcefully grabbed the complainant's testicles, causing excruciating pain, as the complainant waited in line to use the restroom.<sup>102</sup> Additionally, the male passenger pulled the complainant's hand to the male passenger's groin area.<sup>103</sup> Flight attendants did not respond to the victim's pleas for help. One attendant told him that the aggressive male passenger was a harmless friend of hers. Although a crewmember promised to have the male passenger arrested upon arrival in Paris, the man was not detained.<sup>104</sup> The *Langadinos* court recognized that an Article 17 "accident" encompasses torts committed by co-passen-

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<sup>96</sup> *Id.* at \*3.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at \*3, 4.

<sup>99</sup> The court refused to dismiss the Warsaw Convention claims alleging that the airline was responsible for the sexual assault. The court, however, dismissed the common law negligence claims as preempted by the Warsaw Convention. *Id.* at \*5.

<sup>100</sup> 199 F.3d 68 (1st Cir. 2000).

<sup>101</sup> *Id.* at 70.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 70.

gers where airline personnel have a causal role in the commission of the tort.<sup>105</sup> The court determined that there were sufficient allegations attributing the cause of the accident to the airlines because the over-serving of alcohol allegedly caused the sexual assault and the related injuries.<sup>106</sup> The rulings in *Wallace*, *Tsevas*, and *Langadinos* reflect the recent trend in the law expanding air carrier liability to tortious actions of passengers that are somehow related to air travel. This trend in the law has already had a significant impact on the daily operations of commercial airlines.

#### IV. IMPACT ON COMMERCIAL AIR CARRIERS.

The drafters of the Warsaw Convention intended to narrow airline liability to bodily injuries caused by "accidents."<sup>107</sup> The courts, however, have expanded liability by flexibly applying the definition of the term "accident."<sup>108</sup> Air carrier liability for sexual assaults that occur during an international flight has been a logical extension of the "accident" doctrine for unforeseen intentional acts of "malevolent third parties."<sup>109</sup> These cases serve as fair warning to air carriers that their immunity from liability for passenger actions continues to be severely limited to circumstances that do not lend themselves in any way to being labeled as an unusual or unexpected event. The rulings in *Wallace*, *Tsevas*, and *Langadinos* demonstrate that courts have rejected the airlines' argument that the Warsaw Convention was not intended to impose absolute liability on air carriers for the unforeseeable acts of passengers. Under the *Saks* definition of "accident," an injured passenger need only prove that some link in the chain of causation was an unusual or unexpected event external to the passenger.<sup>110</sup> Courts will impose liability on air carriers where a link in the chain of causation was some act or omission on the part of the airline or its employees. The recent trend in the law indicates that air carriers may avoid liability only

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<sup>105</sup> The court vacated the dismissal of the lawsuit and remanded the matter to the United States District Court for the District of Massachusetts. The court, however, recognized that the complainant would still have to prove that he suffered a compensable injury and that the airline's service of excessive alcohol was a proximate cause of his injury. *Id.* at 71, 74.

<sup>106</sup> *Langadinos*, 199 F.3d at 71.

<sup>107</sup> *Eastern Airlines v. Floyd*, 499 U.S. 530, 552 (1991).

<sup>108</sup> *Air Fr. v. Saks*, 470 U.S. 392, 405 (1985).

<sup>109</sup> *La Compagnie Nationale Air Fr., SA v. Haddad*, CA Paris, June 19, 1979, E.C.C. 1981, 207, available at 1981 WL 186649.

<sup>110</sup> *Saks*, 470 U.S. at 406.

when courts adopt the “inherent in air travel requirement” and then find that passenger torts are either not “characteristic risk of air travel” or have no relationship with the “operation of the aircraft.”

The government and the air industry are responding to the startling increase in violent incidents aboard airliners by initiating programs intended to eliminate the security and safety risks caused by unruly and dangerous passengers. The Federal Aviation Administration issued an advisory in 1996 recognizing that an increase in passenger interference with crewmembers was creating a serious safety risk on board aircraft.<sup>111</sup> The FAA advisory recommended “zero tolerance” policies and procedures for handling disruptive passenger behavior, including the prompt reporting of all disturbances.<sup>112</sup> In addition, the FAA and the Department of Transportation<sup>113</sup> launched a pilot program at major airports to prosecute unruly passengers.<sup>114</sup> Under federal law, passengers who engage in unruly behavior aboard an aircraft are subject to criminal and civil penalties.<sup>115</sup>

Aviation industry experts have acknowledged that passenger behavior is directly related to the consumption of alcohol.<sup>116</sup> British governmental authorities have acknowledged the relationship between aggressive behavior of passengers and consumption of alcoholic beverages.<sup>117</sup> A spokesman for airline employees has called for the airlines to adopt strict policies limiting alcohol consumption.<sup>118</sup> Airlines, however, are reluctant to implement an outright ban on alcohol consumption aboard flights because such a ban would impact the profits the airlines reap from the sale of alcoholic beverages.<sup>119</sup> Nevertheless, the

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<sup>111</sup> Interference with Crewmembers in the Performance of Their Duties, FAA Advisory No. 120-65 (Oct. 18, 1996), available at [www.faa.gov/Regulatory\\_and\\_Guidance\\_Library/rgAdvisoryCircular.nsf/](http://www.faa.gov/Regulatory_and_Guidance_Library/rgAdvisoryCircular.nsf/).

<sup>112</sup> *Id.*

<sup>113</sup> FAA Issues Advisory Circular on Dealing With Unruly Passengers, 326 AVIATION DAILY 320 (1996), available at 1996 WL 11116314.

<sup>114</sup> Benjamin Pimentel, *New Federal Campaign Concentrates on Drunk Airline Passengers*, SAN FRAN. CHRON., Nov. 18, 1997, at A22.

<sup>115</sup> Passengers interfering with U.S. airline crews are now subject to a \$25,000 civil penalty. 49 U.S.C. § 46318 (2000).

<sup>116</sup> *Inebriated Passengers to be Breathalyzed*, AIRLINE INDUS. INFO., Mar. 17, 1999, available at 1999 WL 10468766.

<sup>117</sup> *Id.*

<sup>118</sup> Michael Utley, *Rage Takes Flight: An Increase in Rude, Crude and Sometimes Outlandish Behavior Aboard Planes Has Airline Attendants Fighting Back*, PRESS ENTERPRISE (Riverside, Cal.), August 13, 2000, at H01, available at 2000 WL 19878396.

<sup>119</sup> See Ng, *supra* note 14.



airlines and governmental authorities have taken some steps to alleviate the problem. In an effort to screen intoxicated passengers before boarding, the British Civil Aviation Authority is considering using pre-boarding breathalyzer tests for passengers suspected of consuming an excessive amount of alcohol prior to boarding an aircraft.<sup>120</sup> In the United Kingdom, police, airport authorities, and airlines have issued a joint initiative in an effort to deal with unruly passenger problems. Thirty-five airlines have signed a Disruptive Passenger Protocol, which states that the airlines will release the full details of any incident to the police for investigation, and the police will then prosecute for improper behavior.<sup>121</sup>

Furthermore, the International Civil Aviation Organization (ICAO), the agency of the United Nations that administers the Warsaw Convention, has organized an aviation industry panel to review safety and security concerns.<sup>122</sup> The ICAO panel has recently recommended that aircraft be equipped with closed circuit television cameras in an effort to deter criminal activities aboard aircrafts, including hijackings, bombings, and attacks by irate and unruly passengers.<sup>123</sup> Round the clock taping of passenger cabins, the cockpit, the cargo bay area, and exterior portions of the airplane would be a deterrent to criminal activities, as well as, an additional tool that could be used to investigate terrorist and air rage incidents.<sup>124</sup>

Additionally, in 1998, IATA issued guidelines and procedures for its worldwide air carrier members.<sup>125</sup> These guidelines are directed at curtailing the actions of unruly passengers that might lead to tortious incidents and assaults. The IATA guidelines provide suggestions for creating a company policy, producing passenger-warning cards, instituting incident reporting mechanisms and categorizing reported incidents.<sup>126</sup> The guidelines recommend that air carrier members institute screening

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<sup>120</sup> *Id.*

<sup>121</sup> *UK Clamps Down on "Air Rage,"* AIRLINE INDUS. INFO., Jan. 26, 1999, available at 1999 WL 10468198.

<sup>122</sup> This agency is a specialized agency of the United Nations and develops international air standards and regulations for its 185 member states.

<sup>123</sup> Chris Woodyard, *Panel Wants Cameras in Plane Cabins. Advocates Say Move Would Discourage, Record Crime, Air Rage,* USA TODAY, September 28, 2000, at 1B.

<sup>124</sup> *Id.*

<sup>125</sup> IATA Guidelines for Handling Disruptive/Unruly Passengers, December 1998, available at [http://www.iata.org/inflight/disruptive\\_practice.htm](http://www.iata.org/inflight/disruptive_practice.htm) (last visited Oct. 3, 2000).

<sup>126</sup> *Id.*

procedures to prevent problem passengers from boarding a flight.<sup>127</sup> They also recommend that airline employees create a calm atmosphere on-board airliners and maintain constant communication with passengers.

Individual airlines worldwide have also initiated various preventive measures to forestall the rise of incidents aboard aircraft. One air carrier has implemented a policy to deter troublesome passenger behavior that includes training crewmembers to identify and respond to potentially disruptive passengers before they cause problems.<sup>128</sup> The air carrier intends to charge unruly passengers if their behavior costs the airline.<sup>129</sup> Another air carrier intends to sue passengers whose behavior requires an airplane to make an unscheduled landing.<sup>130</sup> Airline personnel worldwide have joined together to draw attention to the problem. July 7, 2000, was proclaimed "a day of action" against air rage by airline employees worldwide.<sup>131</sup> Flight attendants distributed pamphlets educating the public about the problem and urged government officials to take strong action against dangerous passenger behavior.<sup>132</sup>

## V. CONCLUSION

The liability protection of Article 17 of the Warsaw Convention was conceived as a balance between development of the air industry and the protection of passengers who might suffer injuries during their travels. In the 1970's and 1980's, the courts responded to hijackings, terrorist attacks, and bombings on board international aircrafts by imposing liability for passenger injuries caused by these "accidents." At the turn of the twenty-first century, the courts are again responding to the rise in violent incidents aboard aircrafts by extending liability for "accidents" caused by the violent intentional acts of passengers. The rulings in *Wallace*, *Tsevas*, and *Langadinos* strike the proper balance between the rights of passengers and the responsibilities of air carriers. These decisions properly place the burden on the

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<sup>127</sup> *Dealing with Unruly Passengers is All the Rage*, WORLD AIRLINE NEWS, Nov. 20, 1998, available at 1998 WL 5318461.

<sup>128</sup> *Ansett to Implement "Yellow Card" Strategy Against Air Rage*, AIRLINE INDUS. INFO., Nov. 24, 1999, available at 1999 WL 10471413.

<sup>129</sup> *Id.*

<sup>130</sup> *UK Clamps Down on Air Rage*, *supra* note 121.

<sup>131</sup> *Flight Attendants Demonstrate Against Air Rage*, AIRLINE INDUS. INFO., July 7, 2000, available at 2000 WL 4777610.

<sup>132</sup> *Id.*

airlines to eliminate the circumstances and conditions that give rise to disruptive and dangerous passenger behavior.

Commercial air carriers are in the best position to enact and implement safety and security measures that would deter dangerous passenger behavior. To avoid liability for violent passenger behavior, air carriers must be proactive rather than reactive. Airlines must adopt a "zero tolerance" policy for assaults. Airlines should immediately change certain practices and implement new policies and procedures for identifying and responding to potentially disruptive passengers. Air carriers should curtail alcoholic beverage service to intoxicated passengers and limit alcoholic beverage service during delay periods. The courts have sent a clear message that serving alcohol is a sufficient link in the causal chain of responsibility for an Article 17 "accident." Airlines should adopt policies and procedures for handling unruly passenger behavior, such as those suggested in the IATA guidelines. These policies and procedures must be supported by on-board mechanisms for monitoring passenger behavior. Passengers should be advised that the airlines will not tolerate certain prohibited behavior. Passengers should be given written notification of violations, and the airlines should readily enforce the available criminal and civil penalties when incidents occur. Airlines should make this information available at airline counters, at the gates, and in airline in-flight magazines. Preventive measures can impact the number of violent incidents that occur on-board commercial flights. By implementing preventive measures, air carriers can protect the safe passage of their customers and minimize their exposure to liability for Article 17 "accidents."